fact. If the undertaking is not observed the evidence should be expunged."

In reaching my decision, I also have regard to the provisions of section 104, which read:

"The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."

I need hardly add that if due execution is not proved, then the document sought to be produced is, in my opinion, not admissible in evidence.

Order accordingly.

Solicitors: *Thomas & Co.; M.S. Sandhu & Co.*

YEAK CHIE CHAI v. GAN BEE AIK

[A.C.J. (Shankar J.) December 6, 1983]
[Muar – Civil Appeal No. 17 of 1983]

Evidence – Court allowed re-examination but there was no cross-examination – Re-trial ordered – Evidence Act 1950, s. 138(3).

This was an appeal by the plaintiff/landlord who claimed vacant possession against the defendant/tenant. In the court below, the plaintiff gave evidence in support of her case. But in her examination-in-chief her counsel omitted to adduce evidence relating to the notice to quit and the fact that the premises were constructed in 1956. The defendant was given an opportunity to cross-examine which he did not exercise. Then in re-examination which the learned Magistrate permitted, the plaintiff tendered certain documents. The learned Magistrate admitted these documents into evidence and marked them as exhibits. Thereafter, instead of inviting the defendant to cross-examine on these documents the learned Magistrate went on to hold that the evidence adduced by the plaintiff did not show that she was claiming vacant possession and therefore dismissed the claim with costs. The learned Magistrate held that since the said documentary evidence was only put in during re-examination and was not properly identified, the learned Magistrate was not obliged to treat this as admissible evidence which he had to consider. He went on to hold that the plaintiff had failed to discharge the burden of proof.

Held: (1) in this case there was no cross-examination. Therefore it follows that there should have been no re-examination;

(2) since certain documents were admitted as evidence the learned Magistrate was obliged to consider the effect of these documents on the plaintiff's claim;

(3) what happened was not a re-examination but an extension of the examination-in-chief. Having got that far the learned Magistrate should have given the defendant opportunity to cross-examine the plaintiff upon this additional material;

(4) in all the circumstances the needs of justice would be met if the case was remitted for a re-trial.

CIVIL APPEAL.

Pritam Singh Brrard for the appellant.

Tan Lip Yip for the respondent.

Cur. Adv. Vult.

Shankar J.: This is an appeal by the plaintiff who was the owner of certain premises of which she sought vacant possession from the defendant who was a monthly tenant. Before instituting the action she had served the tenant with a notice to quit which appears to be in proper form. There was also evidence that the premises had been constructed in 1956. Therefore the premises were not subject to the control of rent legislation.

In the court below the plaintiff gave evidence in support of her case. But in her examination-in-chief her counsel omitted to adduce evidence relating to the notice to quit and the fact that the premises were constructed in 1956.

The defendant was given an opportunity to cross-examine which he did not exercise.

Then in re-examination which the learned Magistrate permitted the plaintiff tendered the following exhibits:–

A notice to quit.
An A.R. card.
A letter from the Town Council dated 6.11.77 proving construction in 1956.
The title deed.
A receipt for assessment.

The learned Magistrate admitted these documents into evidence and marked them exhibits P1, P1A, P2, P3 and P4.

Thereafter, instead of inviting the defendant to cross-examine on these documents the learned Magistrate went on to hold that the evidence adduced by the plaintiff did not show that she was claiming vacant possession and therefore dismissed the claim with costs.

In his Grounds of Judgment, the learned Magistrate states that since the documentary evidence

aforesaid was only put in during re-examination and were not properly identified, he, the Magistrate, was not obliged to treat this as admissible evidence which he had to consider.

So he went on to hold that the plaintiff had failed to discharge the burden of proof upon her.

With respect to the learned Magistrate, Section 138(3) of the Evidence Act 1950 Revised Act 56-71 states that, "If new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

In this case there was no cross-examination. Therefore it follows that there should have been no re-examination. But in this case further evidence was permitted to be put in by the plaintiff in the shape of exhibits P1 to P4. Since they were admitted as evidence the learned Magistrate was obliged to consider the effect of these documents on the plaintiff's claim.

What happened in reality was not a re-examination but an extension of the examination-in-chief and this of course is permitted by section 138(4) of the Evidence Act.

Having got that far, the learned Magistrate should have given the defendant opportunity to cross-examine the plaintiff upon this additional material.

The record does not indicate that the defendant was given such opportunity.

In all the circumstances I am of the view that the needs of Justice will be met if this case is remitted for a re-trial.

Had the matter been a lengthy one I would have directed the Magistrate to continue with the hearing and after furnishing the defendant with the opportunity to cross-examine, to address his mind to the effect of the documentary evidence on the action.

However the facts of this case are simple and the evidence is quite short. The parties should not be prejudiced by a re-trial and I accordingly order.

In my discretion I also order that each party will bear his own costs both here and in the court below in so far as it relates to the previous hearing.

Re-trial ordered.

Solicitors: *Pritam Singh & Co.; Tan Lip Yip & Co.*

KEE LIK TIAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Edgar Joseph Jr. J.) December 15, 1983]
[Ipoh – Perak Criminal Appeal No. 82 of 1983]

Criminal Law & Procedure – Summary trial – Application to have witness examined by psychiatrists – Competence to testify – Application to cross-examine witness.

Evidence – Child witness mentally retarded – Competence to testify – Whether witness should be affirmed or just warned to speak the truth – Hearsay evidence – Evidence Act, 1950, ss. 32, 33, 45 & 118 – Oaths and Affirmations Act, 1949, s. 8.

In this case the appellant had been convicted of the offence of rape on a girl aged 12½ years. The learned President of the Sessions Court who tried the case found the girl to be mentally retarded or otherwise having a very low I.Q. but he held that she was a reliable and credible witness. Applications were made during the trial for the girl to be sent to a psychiatrist and also to have her cross-examined on her report but these were refused. The appellant appealed.

Held, (1) in the circumstances of this case, the learned President should have determined the competence of the witness to testify and he should have done this with the aid of expert medical opinion;

(2) if the witness was found competent to testify the President should then have determined whether she should be affirmed or just warned to speak the truth;

(3) in this case the reasons advanced by the defence for the recall of the witness for further cross-examination were sufficient to justify the making of an order for recall;

(4) the refusal of the applications in this case prevented the appellant from exercising a statutory right and therefore the appeal should be allowed and an order made for the appellant to be re-tried before another President.

Cases referred to:

(1) *Myers* v. *Director of Public Prosecutions* [1965] A.C. 1001.
(2) *A.* v. *Lal Sahai* (1889) 11 All 183.
(3) *R.* v. *Shara* (1891) 16 Bom. 359, 364.
(4) *Ah Phut* v. *King* A.I.R. 1939 Rang. 402.
(5) *Jalwanti Lodhin* v. *State* A.I.R. 1953 Pat. 246.
(6) *Krishna Kahar* v. *Emperor* A.I.R. 1940 Cal. 182
(7) *Ng Kwee Piow* v. *Regina* [1960] M.L.J. 278, 279.
(8) *R.* v. *Hayes* [1977] 1 W.L.R. 234.